

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

ORIGINAL

MAR 3 1997

Office of Secretary

In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Programming Accessibility)

MM Docket No. 95-176

MOTION TO ACCEPT LATE-FILED COMMENTS

Bell Atlantic¹ and NYNEX² ("the Companies"), pursuant to sections 1.3 and 1.45 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.45, hereby move that the Commission accept for filing in the above captioned docket the attached Joint Comments of Bell Atlantic and NYNEX, which the companies sought to file on February 28, 1997.

As the attached affidavit shows, Bell Atlantic's clerk was delayed at the Department of Justice ("DOJ") when he attempted to make another filing there, and then was delayed by traffic between DOJ and the Commission. As a result, he reached the Commission's offices at 5:32 p.m. and was unable to file the Comments.

In light of their good-faith effort to make a timely filing, the companies respectfully request that the Commission accept the attached Comments for filing nunc pro tunc. Because

¹ The Bell Atlantic companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., and Bell Atlantic Video Services Company.

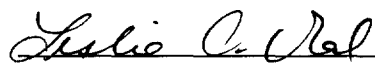
² The NYNEX Telephone Companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

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reply comments are not due until March 24, no party will be disadvantaged as a result. In addition, the public interest will be served by allowing the Commission the fullest consideration of all issues raised in the Petitions.

Respectfully submitted,


Leslie A. Vial

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On behalf of the Bell Atlantic Telephone
Companies, Bell Atlantic Video Services
Company and the NYNEX Telephone
Companies

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MM Docket No. 95-176

To: The Commission

DECLARATION OF STEVEN E. MCPHERSON


I, Steven E. McPherson, declare as follows:

1. I submit this declaration in support of the Motion to Accept Late-Filed Comments of Bell Atlantic and NYNEX ("the Companies") in the above-captioned matter. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.
2. I am an employee of Bell Atlantic.
3. On February 28, 1997, I was delayed at the Department of Justice ("DOJ") when I attempted to make another filing there. I then headed to the offices of the Commission at 1919 M Street, NW, Washington, D.C., prepared to file Joint Comments of the above parties.
4. I was delayed by traffic between DOJ and the Commission, and arrived at the FCC's offices at 5:32 p.m.

5. As a result I was unable to file the comments. The Security guards at the front desk would not permit me to pass or go to the second floor to file the Joint Comments.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on March 3, 1997 in Arlington, Virginia.


Steven E. McPherson

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FEDERAL COMMUNICATIONS COMMISSION
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JOINT COMMENTS OF BELL ATLANTIC¹ AND NYNEX²

I. Introduction and Summary

Bell Atlantic and NYNEX ("the companies") are committed to making their products and services accessible to the broadest range of customers possible. Bell Atlantic is currently delivering video programming that has been captioned by the programming provider over its digital video system in Dover Township, New Jersey. Bell Atlantic and NYNEX use advertising that is accessible to consumers who have hearing or visual disabilities.

In addition, Bell Atlantic and NYNEX have underwritten closed captioning for a variety of programming, including local television news shows, weekend broadcasts of Boston Red Sox games, and a weekly cable program designed to promote independent living by people with disabilities. The companies have also actively supported measures by advocacy groups to

¹ The Bell Atlantic companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., and Bell Atlantic Video Services Company.

² The NYNEX Telephone Companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

promote accessibility to telecommunications and entertainment services, including providing payphones equipped with TTY functionality and providing financial support for other community programs that use telecommunications technology to improve the quality of life for people with disabilities.

All customers will benefit if closed captioning is done in the most efficient way possible. As the Commission recognized, “captioning at the production stage is often the most efficient manner to include closed captioning with video programming.”³ Accordingly, the Commission should place the obligation for captioning new, non-exempt programming on the program producer or creator. In addition, the Commission should require all entities that distribute programming directly to consumers -- and all operators of the underlying transmission media, to the extent they are different entities -- to deliver captioning that is included in programming intact to end users. This sharing of responsibility will avoid running afoul of copyright laws.

If the Commission nevertheless decides to place the captioning obligation on the entity providing programming to the end user, the Commission should make clear that it is the broadcast network or multiple video programming distributor (“MVPD”) which has the obligation. In the case of an open video system (“OVS”) or common carrier video delivery network, the OVS operator or network owner should have no obligation to ensure the captioning of programming which is provided by unaffiliated video programming providers. In addition, the Commission should affirm that the MVPD has the right to require the producer or creator to caption programming by contract and should make clear that the program producer or creator may not use captioning as a means of discriminating between distribution methods or

³ *Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176, Notice of Proposed Rulemaking (rel. Jan. 17, 1997) (“NPRM”) at ¶ 30.

transmission media. Finally the Commission should make clear that MVPDs have no requirement to caption programming where doing so would cause them to violate copyright laws.

II. Closed Captioning Should Be Provided By The Producer Or Creator Of Programming.

The Commission has recognized that “captioning at the production stage is often the most efficient manner to include closed captioning with video programming.”⁴ By contrast, it would be extremely inefficient and, in some cases, technically impractical or even unlawful to place the obligation for providing closed captioning on the video programming distributor, rather than the program creator.

A. Captioning Is Most Efficiently Done At The Program Production Stage.

In a digital system, the encoding of programming material will often be performed at the programming provider’s premises, not at the distributor’s premises. In order for the programming distributor or video system operator to create and insert closed captioning, the distributor or operator would have to access the encoded cable, broadcast, or satellite programming feed, locate the particular digital ones and zeros representing the particular programming at issue, decompress those signals in order to retrieve the picture and sound in analog format for viewing and editing, create and insert captioning, again compress and encode the programming, and then retransmit it. That process could result in both substantial delay and some loss of picture quality due to repetitive compression and decompression of the video stream.

Moreover, placing the obligation for creation and insertion of captioning or description on the distributor of either live or pre-recorded programming would require duplicative and

⁴ NPRM, ¶ 30.

expensive action by every local distributor. Each local distributor may have a hundred or more channels, and each local distributor would ultimately have to monitor every channel, 24 hours per day, seven days a week. In contrast, if captioning or description is added when programming is created, the expense is incurred once and becomes part of the programming wherever it is subsequently distributed.

In the case of live programming, it is more sensible to place the obligation for captioning on the program creator, who is more likely to attain a higher degree of accuracy under acute time pressure. Unlike the programming distributor or video system operator, the program creator will have access to the program script, know in advance the likely program format and presentation, have the correct spelling of the names of all the people, places, and things featured in the program, and generally have a much higher probability of providing accurate captioning in “real time.”

The NPRM notes that certain limitations exist “such as the number of available captioners and captioning services, [and] the costs of captioning.”⁵ These limitations reinforce the efficiency of placing the obligation for captioning on the program producer or creator. The limited availability of qualified captioners and captioning services will only be exacerbated if thousands of local distribution systems must obtain such services; it is far better and a more efficient use of the available captioning resources to caption a program once when it is produced rather than requiring it to be done by every local distributor. Similarly, it makes far more sense to incur the cost of captioning once when the program is produced rather than multiplying that cost by the number of local distributors who will be responsible for captioning under the

⁵ NPRM, ¶ 40.

Commission's proposal. The efficient performance of captioning will both broaden the availability of captioned programming and reduce costs to all consumers of video programming.

The NPRM recognizes and attempts to mitigate the inefficiency associated with placing the obligation for captioning on the programming distributor.⁶ These somewhat strained efforts would be unnecessary, however, if the obligation for captioning were placed on the program producer or creator. For example, the NPRM indicates that the Commission expects program distributors to include requirements for captioning in their contracts with program producers.⁷ While the ability to include such requirements in contracts will be necessary if the Commission adopts its proposal, it does little to resolve the underlying inefficiency. Instead, it will result either in program producers being subject to tens of thousands of potentially differing contract provisions requiring captioning, or it will result in producers of desirable programming using their ability to provide closed captioning efficiently as leverage in contract negotiations to discriminate against less favored delivery methods or transmission technologies or even to affect competition between various MVPDs.⁸

B. The Commission Should Avoid Creating Conflicts With Copyright Laws.

Under existing law, copyrighted programs may not be altered by adding or deleting material, or otherwise edited by the programming distributor. Only the copyright owner can reproduce, modify, translate, or interpret his or her copyrighted material. The right to perform or authorize closed captioning of any program, therefore, belongs to the owner of the copyright of

⁶ NPRM, ¶¶ 30, 86.

⁷ See NPRM, ¶ 30.

⁸ The NPRM states that "a provider can refuse to purchase programming that is not closed captioned." ¶ 28 If the programming is popular, the provider may not be able to "refuse" to purchase the programming without jeopardizing the competitive viability of its offering.

that program.⁹ As a result, programming distributors or network operators would be at substantial legal risk for copyright infringement if required to alter such programming by superimposing captioning. It makes no sense for the Commission to place the responsibility for closed captioning on program distributors who cannot accomplish it efficiently and who have no legal right to do it in any event.

III. Network Operators Without Editorial Control Should Be Required To Deliver Existing Captioning Intact To Consumers, But Should Not Be Required To Perform Captioning.

The Commission should clarify that network or system operators who have no editorial control over the selection of programming delivered over their systems have no obligation to perform captioning. Open video systems and common carrier video delivery systems are designed to allow VPPs that are unaffiliated with the network or OVS operator to provide programming directly to consumers. The network or OVS operator exercises no editorial control over the system capacity used by such unaffiliated VPPs. Moreover, the OVS operator has no ability to view the programming while being transmitted over the network. Requiring the OVS operator to ensure the captioning of programming provided by unaffiliated VPPs would be extremely difficult technically and prohibitively expensive. As a result, such a requirement would make the deployment of OVS uneconomic.

Bell Atlantic and NYNEX agree, however, that system and network operators -- regardless of the transmission technology -- should be obligated to deliver existing captions intact. Bell Atlantic already does so over its digital video system in Dover Township, New

⁹ See 17 U.S.C. §§ 106, 111.

Jersey, and the companies will ensure that other systems they construct or operate in the future are capable of doing so.

CONCLUSION

Bell Atlantic and NYNEX are committed to ensuring that their telecommunications services are accessible and widely marketed to a broad range of diverse users, including individuals with disabilities. The companies support efforts to increase the availability of captioned programming. All customers will benefit if captioning is done as efficiently as possible -- more captioned programming will be available and costs will be lower. The Commission should, therefore, adopt rules placing the obligation to caption programming on the program producer and creator. The Commission should also require that all system operators --

whatever the transmission technology -- deliver existing captions intact to all customers served by the system.

Respectfully submitted,

Of Counsel

Edward D. Young, III

Michael E. Glover



Leslie A. Vial

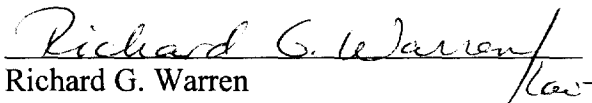
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February 28, 1997